

Brown v Klare

2013 NY Slip Op 30320(U)

February 6, 2013

Supreme Court, New York County

Docket Number: 102669/11

Judge: Joan M. Kenney

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2/13/13
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN M. KENNEY
J.S.C.

PRESENT: _____
Justice

PART 8

INDEX NO. 102669/11

MOTION DATE _____

MOTION SEQ. NO. 004

Brown, et al.

-v-

Jeffrey Klave

Summary Judgment

The following papers, numbered 1 to 17, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

No(s) 1-12
No(s) 13-15
No(s) 16-17

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FOR THE FOLLOWING REASON(S):

Dated: 2/6/13

JOAN M. KENNEY J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN-PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- slo DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Larry Brown, Matthew Notine,
Leonard Feldman, and At Hands
Apps, LLC.,

Plaintiffs,

-against-

Jeffrey Klare,

Defendant.

DECISION AND ORDER

Index Number: 102669/11

Motion Seq. No.: 004

-----X
KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these pre-answer motions to dismiss.

Papers	Numbered
Notice of Motion, Affirmation, Exhibits, and Memo of Law	1-12
Opposition Affirmation and Exhibits	13-15
Reply Affirmation, Memo of Law	16-17

In this breach of contract action, plaintiffs, Larry Brown, Matthew Notine, Leonard Feldman, and At Hands Apps, LLC. (At Hands), moves for an Order, pursuant to CPLR 3212, awarding summary judgment to plaintiffs, against defendant, for the combined sum of \$500,000.00.

Factual Background

Hire Disability Solutions, LLC (the company), was formed in 2004 by plaintiffs Feldman and Brown, and defendant Klare, with non-party Robert Notine. At the time of formation, defendant held a 49% interest in the company. Plaintiff, At Hands, subsequently purchased 25% of defendant's interest, and Robert Notine assigned his interest to Plaintiff Matthew Notine.

Since the inception of the company, defendant has allegedly had a very active role. It has been his primary source of employment and income since 2004. Defendant's duties at the

hired and fired employees, and had a general idea of the cash flow coming into the company.

On or about June 30, 2009, defendant executed four promissory notes (the notes) whereby he agreed to pay plaintiffs the sum of \$500,000.00 to purchase the remaining 76% interest of the company from them. The notes outlined annual installments that defendant would pay to the plaintiffs, based on their equity share.

Annual installments under the notes were to be made beginning on December 31, 2009, and ending on December 1, 2014. The notes also included an acceleration clause making the entire balance of the notes due upon default continuing for more than 10 days after written notice thereof at each plaintiffs' election.

Defendant defaulted on the first payment due December 31, 2009. Plaintiffs, through their attorney, sent a letter to defendant on April 15, 2010, notifying him of his default and demanding payment. At his examination before trial (EBT), defendant admits to having received this letter. (Moving Papers, Exhibit I, Pg. 44, L. 8-15).

Following that notice, plaintiffs did not receive any payment(s) from defendant, and proceeded to file this claim.

Procedural Background

On March 4, 2011, plaintiffs moved for summary judgment in lieu of a complaint. Defendant opposed, stating that he had not been informed, in writing, of any default under the notes. This Court entered an Order on June 7, 2011, denying plaintiff's motion.

On June 29, 2011, plaintiffs submitted a motion to renew the previous motion, and included the April 15, 2010 letter to defendant, notifying him of his default, and demanding payment. On July 27, 2011, this Court entered an Order, granting plaintiff's motion to renew, but

denying the summary judgment, for failure to provide proof of notice.

Following that Order, parties engaged in discovery.

Arguments

Plaintiffs allege that since defendant has failed to make any payments on the notes, they are entitled to judgment as a matter of law.

Defendant argues that summary judgment is not warranted because there is an unresolved material issue of fact with respect to the nature and enforceability of the notes, particularly as to whether defendant received the benefit of his bargained-for consideration. Specifically, defendant claims that plaintiffs made misrepresentations regarding the financial condition of the company and that he was not afforded all the documents he requested.

Discussion

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision ‘c’ of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “The proponent of a summary

judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

“The essential elements of cause of action to recover damages for breach of contract are existence of contract, plaintiff’s performance under contract, defendant’s breach of that contract, and resulting damages.” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept. 2010]; *J.P. Morgan Chase v J.H. Elec. Of NY*, 69 AD3d 802 [2nd Dept. 2010]).

A plaintiff establishes a prima facie entitlement to judgment on promissory notes as a matter of law by producing the promissory notes executed by defendant and by establishing defendant’s default thereon. (*Dvoskin v Prinz*, 205 AD2d 661 [2nd Dept. 1994]; *Berlind v Heinfling*, 176 AD2d 452 [1st Dept. 1991]).

A defendant may not claim as a defense to a breach of contract that they were unaware of a company’s financial situation when merely exercising ordinary intelligence prior to the signing of the document(s) would have uncovered such information. (*HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept. 2012]; *Stuart Silver Associates, Inc. v Baco Development Corp.*, 245 AD2d 96 [1st Dept. 1997]).

Here, it is undisputed that defendant breached each of the notes he had signed with plaintiffs. While this Court’s prior Order called for documentary proof of defendant’s notice of default in the form of a Federal Express receipt, defendant’s subsequent EBT has eliminated that need. Defendant admits to actual notice of the default letter sent April 15, 2010 by plaintiffs’ counsel. Even if that were not the case, plaintiffs have provided said receipt in their moving

papers. (Plaintiffs' Moving Papers, Exhibit G).

Defendant's argument that he was not provided with required financial documentation falls short for two reasons. First, as the above language states, he could have easily refused the purchase until such documents were handed to him. Secondly, language in the purchase agreement of the company states, "Each party to this Agreement agrees to execute and deliver any instrument and take any action which may reasonably be requested by another party for the purpose of carrying out, or causing [HDS] to carry out, the provisions of this Agreement." (Opposition Papers, Exhibit A). That document was then signed by defendant. After consenting to such language and then proceeding to sign it, defendant cannot now claim to have been denied certain financial documents, clearly when it is convenient for him to do so. Accordingly, it is hereby

ORDERED, that plaintiffs' motion, awarding them summary judgment, is granted; and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of all plaintiffs in the amount of \$500,000.00, plus interest, costs, and attorney fees; and it is further

ORDERED, that plaintiffs submit a Judgment and Order no later than March 7, 2013.

Dated: 2/6/13

ENTER:


Joan M. Kenney, J.S.C.